Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1998

VLASIC FOODS INTERNATIONAL, INC.

Petitioner,

v.

IRMA D. DEFOREST, EXECUTRIX OF THE ESTATE OF JIM ZENDER, AND OF JIM ZENDER, D.B.A. "Z" TOMATO COMPANY, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITES STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS FOR REVIEW

1. As a matter of Federal law and procedure, can a corporation which had its corporate powers suspended during the time for noticing its appeal, and during the entire pendency of the appeal, retroactively confer jurisdiction on a Court of Appeal by reviving its corporate powers after the case is remanded to the District Court?

2. Does a federal court have jurisdiction to hear claims of an individual after final judgment against him, when on appeal, he is named neither in the caption nor the body of the notice of appeal, and where the individual has been doing business as a corporation?

3. Can a valid judgment be based upon the premise that the defendant should have ignored a federal tax lien?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Court of Appeal were:

Petitioner, Vlasic Foods International, Inc. ("Vlasic").

Respondent is Irma D. DeForest, Executrix of the Estate of Jim Zender, and of Jim Zender, d.b.a. "Z" Tomato Company, Inc.

RULE 29.6 STATEMENT

Vlasic has no parent company or nonwholly owned subsidiary. It should be noted that on March 30, 1998, one share of Vlasic, no par value common stock, was distributed to shareowners of Campbell Soup Company ("Campbell") for every ten shares of Campbell stock held by such shareowners at the record date in a tax-free distribution. At the time of distribution, Vlasic began operations as a separate independent publicly owned company. Before the record date, Vlasic was a wholly owned subsidiary of Campbell.

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OPINIONS BELOW

The opinions of the Ninth Circuit are unpublished, but found and referenced at 91 F.3d 158 (Table), 1996 WL 406145 (9th Cir. 1996) and 156 F.3d 1236 (Table), 1998 WL 483220 (9th Cir. 1998).

STATEMENT OF JURISDICTION

1. The Ninth Circuit rendered its decision on August 12, 1998 (App.1a-4a).

2. Vlasic filed a timely petition for rehearing on September 4, 1998.

3. The Ninth Circuit denied Vlasic's petition for rehearing on October 6, 1998 (App. 7a-8a).

4. Jurisdiction to hear this petition exists under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

On March 27, 1992, "Jim Zender dba 'Z' Tomato Company, Inc." sued Vlasic (App. 19a). "Z" filed an amended complaint on December 2, 1992 in the name of "Jim Zender and 'Z' Tomato Company, Inc." (App. 20a). "Z" filed a second amended complaint on October 12, 1993 in the name of "Jim Zender dba 'Z' Tomato Company, Inc." (App. 21a). In each complaint, Zender described himself as both an individual and corporate defendant. However, in California, when a person uses the designation "dba," California recognizes only one legal entity. Pinkerton's Inc. v. Superior Court, 49 Cal.App.4th 1342, 57 Cal.Rptr.2d 356

(1996). Under California law, only a corporation is entitled to adopt any fictitious business name which includes "Corporation," "Corp.," "Incorporated," or "Inc." California Business & Professions Code § 17910.5.

In January 1994, after a jury trial, the district court granted Vlasic's motion for judgment as a matter of law on breach of contract and bad faith denial of contract claims, and ordered a new trial on the remaining (tort) claims (App. 10a-16a). On October 5, 1994, the successor judge granted Vlasic's motion for summary judgment on all remaining claims (App. 9a).

On October 12, 1994, a Notice of Appeal was filed ("First Notice of Appeal"), captioned, "Jim Zender dba 'Z' Tomato Company Inc., Plaintiff v. Vlasic Foods, Inc., Defendant." The body of the appeal stated, "NOTICE IS HEREBY GIVEN that Jim Zender dba "Z" Tomato Company Inc. in the above case, hereby appeals to the United States Court of Appeals for the Ninth Circuit . . ." Jim Zender the individual, even if he had a recognizable legal identity apart from the corporation "Z" (which he did not have), was not named in the caption or body of the first Notice of Appeal (App. 25a-26a).

On July 19, 1996, the Ninth Circuit reversed and remanded the matter for trial. 1996 WL 406145.

Before the First Notice of Appeal was filed, on September 1, 1994, "Z" Tomato Company, Inc. was suspended as a California corporation for nonpayment of taxes (App. 22a-24a). "Z" Tomato remained suspended during the entire pendency of the first appeal. "Z" Tomato's corporate status was revived on January 22, 1997 (App. 29a). At no time did "Z" Tomato or its counsel inform the court or opposing counsel of the suspension of its corporate status.

On retrial, the central issue presented to the jury was whether Vlasic had an obligation to make a rental payment on "Z" Tomato's behalf on an agricultural lease for the fall of 1991. Before the payment was due, on May 28, 1991, the United States Internal Revenue Service served Vlasic with a Notice of Levy for Z Tomato Company Inc.'s failure to make payroll tax payments of $74,281.72 (App. 17a-18a). The Notice of Levy provided and required:

> Notice and demand, as required by the Internal Revenue Code, have been made, and the taxpayer has neglected or refused to pay. This amount is still due, owing, and unpaid. All property, rights to property, money, credits, and bank deposits now in your possession and belonging to this taxpayer (or for which you are obligated) and all money or other obligations you owe this taxpayer, are levied upon for payment of the tax, plus all additions provided by law.[1]

The district court refused to dismiss "Z" Tomato's claim as barred by its failure to file a timely appeal, and refused to dismiss Zender's individual claim as barred by his failure to appeal the adverse judgment against him. The district court denied Vlasic's Rule 50 motions to dismiss "Z" Tomato's damage claims based upon the effect of the IRS levy.

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[1] Thereafter, the only invoice that "Z" Tomato sent to Vlasic was for $17,900, with a promise that "James Zender DBA: 'Z' Tomato Company, Inc., will have no further charges or claims to Vlasic Foods, Inc. for prior cucumber production operations" (App. 309-310). Vlasic paid this amount to the Internal Revenue Service as required by the Notice of Levy.

The Ninth Circuit held that California State law governed the question of federal procedure and jurisdiction – that "Z" Tomato could retroactively "validate" the Notice of Appeal and appeal, which were invalid when filed and prosecuted (App. 2a):

> Z Tomato was able to prosecute its claim against Vlasic despite its corporate suspension during its prior appeal. California law controls the question of Z Tomato's capacity to sue. See Federal Rule of Civil Procedure 17(b); Gough v. Titus (In re Christian & Porter Alum. Co.), 584 F.2d 326, 331 (9th Cir. 1978). California law provides that revival of corporate status retroactively validates acts taken in the prosecution of a case unless the adverse party has accrued a substantive defense during the corporation's suspension. See Peacock Hill Ass'n v. Peacock Lagoon Constr. Co., 8 Cal.3d 369, 373 (1972); Welco Constr., Inc. v. Modulux, Inc., 47 Cal. App. 3d 69, 72 (Cal. App. 1975). Retroactive validation of corporate acts applies to acts taken both before and after judgment. Peacock, 8 Cal.3d at 373-74. *The California Supreme Court has determined that pursuing an appeal is a procedural step that can be retroactively validated by revivor.* [Italics added.]

The Ninth ignored Rule 3(c) and its requirement that "a notice of appeal must specify the party or parties taking the appeal by naming each appellant in either the caption or the body of the notice of appeal." The Ninth Circuit held (App. 3a):

> Jim Zender identified himself as an individual party in the lawsuit pleadings and in the notice of cross-appeal. Although his captions in the lawsuit pleadings are "imprecisely worded," the text of the pleadings clearly indicate [sic] Jim Zender's intent to pursue his claims as an individual plaintiff.

The Ninth Circuit also ignored that Zender the individual lost his right to continue to sue Vlasic when he failed to appeal from the adverse judgment against him in the First Notice of Appeal. The Ninth Circuit focused only on the cross appeal after the second trial – long after Zender's individual rights had expired (App. 3a):

> Further, the captions of his cross-appeal and amended cross-appeal specifically list him as an appellant.

Among other mistakes, the Ninth Circuit ignored that the caption and notice of appeal by "Jim Zender dba 'Z' Tomato Company, Inc." signals that the *only* party is the corporation. California. Business and Professions Code § 17910.5.

The Ninth Circuit never addressed (even when asked again on Vlasic's petition for reconsideration) how Vlasic could have been required to make an agricultural lease payment on "Z" Tomato's behalf when the Internal Revenue Service had served a lien preventing any such payment.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED BECAUSE THE NINTH CIRCUIT'S APPLICATION OF CALIFORNIA PROCEDURAL LAW TO ALLOW RETROACTIVE VALIDATION OF A FEDERAL NOTICE OF APPEAL THREATENS THE UNIFORMITY OF FEDERAL LAW

The Ninth Circuit decision to allow retroactive validation of a notice of appeal, applying California procedural law to the appeal in this case, threatens the uniformity of federal jurisprudence envisioned by Hanna v. Plumer, 380 U.S. 460 (1965). The decision also conflicts with this Court's decisions in Torres v. Oakland Scavenger Company, 487 U.S. 312 (1988) and Budinich v. Becton Dickinson & Company, 486 U.S. 196 (1988) which hold that the requirements of Rules 3 and 4 of the Federal Rule of Appellate Procedure are mandatory and jurisdictional, and that the uniform application of these rules cannot, as a matter of Federal policy and procedure, be left in doubt.

Under Federal Rule of Civil Procedure 17(b), "The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized." Under California law (under which "Z" Tomato Company, Inc. was organized), a suspended corporation may neither prosecute nor defend an action. California Revenue and Taxation Code § 23301. California courts have distinguished between substantive and procedural defenses that accrue during a period of suspension. Procedural acts may be retroactively validated under California law, but substantive defenses (such as statutes of limitations) continue to accrue and may not be retroactively validated. Welco

Construction Inc. v. Modulux Inc., 47 Cal.App.3d 69, 120 Cal.Rptr. 572 (1975).

The California Supreme Court in 1972 held that the filing of a valid and timely notice of appeal is a procedural act, which can be retroactively validated. Peacock Hill Association v. Peacock Lagoon Construction Company, supra, 8 Cal.3d 369, 503 P.2d 285 (1972).

Although California law determines whether a corporation is a person with capacity to sue, federal law determines when and how such a person must act in order for federal courts to have jurisdiction over its claim. Federal Rule of Appellate Procedure 3(c) requires that a "party" notice the appeal. Rule 4(a) requires that a "party" file notice of appeal within 30 days (in a normal civil case). These rules are mandatory and jurisdictional. Torres v. Oakland Scavenger Company, supra, Budinich, supra. Because two Federal Rules plainly apply, the Supremacy Clause demands the application of the federal rule under the Rules Enabling Act, without consideration of Erie principles or the desirability of applying contrary state law. Hanna v. Plumer, supra.

Although the Ninth Circuit did not apply the analysis of its Olympic Sports Products, Inc. v. Universal Athletic Sales Company, 760 F.2d 910 (9 Cir. 1985), *cert. denied*, 474 U.S. 1060, the confusion of that case informed its decision. Alone among the circuits, the Ninth Circuit has grafted an additional layer of analysis upon the clarity of Hanna v. Plumer. Even where a federal rule applies and is within the scope of constitutional power and the Rules Enabling Act, the Ninth Circuit requires an additional determination of whether "Erie considerations are so strong that they can justify interrupting the normal function of the federal court processes." 760 F.2d at 914-915. See Wright

and Miller, Federal Practice & Procedure § 4508 (Supp.) (1998). The Ninth Circuit's improper bias toward the "prerogatives of state law against incursions by a Federal Rule" informed its decision to allow state law retroactively to validate an invalid appeal long after the notice of appeal and the entire appeal period had passed.

II. CERTIORARI SHOULD BE GRANTED BECAUSE THE NINTH CIRCUIT IGNORED THE PLAIN LANGUAGE OF THE FEDERAL RULES OF APPELLATE PROCEDURE AND THIS COURT'S DECISIONS DO NOT ALLOW AN APPEAL BASED UPON AN IDENTIFCATION OF THE PUTATIVE APPELLANT IN THE "LAWSUIT PLEADINGS" AND A LATER APPEAL

After final judgment was entered against both Jim Zender and Jim Zender dba "Z" Tomato Company Inc., the October 12, 1994 notice of appeal listed only "Jim Zender dba 'Z' Tomato Company Inc. in the caption and the body of the appeal. Federal Rule of Appellate Procedure 3(c) mandates "A notice of appeal must specify the party or parties taking the appeal by naming each appellant in either the caption or the body of the notice of appeal." Even though Rule 3(c), as amended in 1993, allows appellants to be generally described as "all plaintiffs" or "et al.", there must be some designation of the party taking the appeal in the body or caption. The requirements remain mandatory and jurisdictional. Torres, Budinich, supra.

The Ninth Circuit ignored Zender's failure to appeal from the judgment against him, and held that his cross-appeal on the second appeal and his "lawsuit pleadings" were sufficient to validate the first appeal.

> Jim Zender identified himself as an individual party in the lawsuit pleadings and in the notice of cross-appeal. Although his captions in the lawsuit pleadings are "imprecisely worded," the text of the pleadings clearly indicate Jim Zender's intent to pursue his claims as an individual plaintiff.

The Ninth Circuit decision so far departs from the plain language of the Federal Rule and this Court's decisions in Torres and Budinich that certiorari should be granted.

III. THE NINTH CIRCUIT DECISION IS BASED UPON THE PREMISE THAT VLASIC SHOULD HAVE IGNORED A FEDERAL TAX LIEN, A DECISION THAT SO FAR DEPARTS FROM FEDERAL POLICY AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER

This Court has long recognized that "collection of taxes is vital to the functioning, indeed existence, of government cannot be denied." United States v. Kimball Foods, Inc., 440 U.S. 715 (1979). The importance of securing adequate revenues to discharge national obligations justifies the extraordinary priority accorded federal tax liens through the choateness and first-in-time doctrines. Id. The policy of enforcing Federal tax liens overrides state filing laws. United States v. Union Central Life Insurance Company, 368 U.S. 291 (1961).

The Ninth Circuit decision contradicts this important national policy and requires the exercise of the Court's supervisory power. "Z" Tomato Company Inc. did not pay its federal payroll taxes. On May 28, 1991 the United States Internal Revenue Service served Vlasic with a Notice of Levy for Z Tomato Company Inc.'s failure to make payroll tax payments of $74,281.72 (App. 329). The Notice of Levy provided that "all money or other obligations you owe this taxpayer, are levied upon for payment of the tax, plus all additions provided by law. "Z" Tomato Company's damage claim depended upon the premise that Vlasic should have ignored the IRS Levy and made the agricultural lease payment anyway.[2]

Vlasic could not have ignored the IRS Levy. Vlasic could not have paid "Z" Tomato's lease. "Z" Tomato could not have performed and was not entitled to damages.[3]

CONCLUSION

In Europe during the Fourteenth Century, two kings claimed the thrones of England and France, three popes purported to reign, and periodically the plague would erupt. Hardly a harmonious federal system. One might think it the

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[2] Vlasic paid the IRS on the only invoice it received from "Z" Tomato after being served with the Levy.

[3] California law requires a plaintiff in a contract action to prove, even in cases of anticipatory breach, that it had the ability to perform. The plaintiff has the burden of proof on the issue. Ersa Grae Corporation v. Fluor Corporation, 1 Cal.App.4th 613, 624-625, 2 Cal.Rptr.2d 288 (1991).

model for the Ninth Circuit, however, as it ignores federal uniformity on issues of jurisdiction and taxation.

A writ of certiorari should be granted to correct the Ninth Circuit's departure from accepted and important issues of federal law.

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